STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of WINTER MORNING STAR LEE SIZEMORE, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

WENDY LOU SIZEMORE,

Respondent-Appellant.

UNPUBLISHED
June 24, 2004

No. 251074
Wayne Circuit Court
LC No. 00-393514

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Respondent appeals as of right an order terminating her parental rights to the minor child under MCL 712A.19b(3)(b)(*i*) and (*ii*), (g), (i), and (j). The father, Michael Sizemore (hereinafter "Sizemore"),[1] voluntarily relinquished his parental rights to the minor child.

A permanent custody petition was filed on February 7, 2002, seeking to terminate the parental rights of respondent and Sizemore to the recently-born, minor child. The petition alleged that the minor child's six older siblings were made temporary wards of the court on March 15, 2001, and that a permanent custody petition, including allegations of physical and sexual abuse, drug and alcohol abuse, and failure to protect, was pending. Additionally, respondent and Sizemore allegedly attempted to hide the pregnancy and the minor child's birth from the FIA. On February 12, 2002, respondent's and Sizemore's parental rights were terminated to the older children, but not the child at issue here. This Court affirmed the termination of parental rights. *In re MDLS*, unpublished opinion per curiam of the Court of Appeals, issued January 17, 2003 (Docket No. 240470). In August 2003, the trial court, in the case at bar, terminated respondent's parental rights to the minor child.

[1] Sizemore is respondent's husband.

The focus of this appeal is on respondent's interaction with Sizemore, who is claimed to have sexually and physically abused the older children. Respondent repeatedly vacillated on whether she believed Sizemore engaged in the abuse, and she was reluctant to separate herself from Sizemore. After it became clear to respondent that her parental rights would be terminated if she did not disassociate herself from Sizemore, respondent appeared to commence breaking all ties with him. She was also making excellent progress on other matters, such as therapy. Accordingly, the referee found that respondent had sufficiently rehabilitated herself so as to be given a chance to parent the minor child. The permanent custody petition was denied. Respondent was ordered to file for divorce from Sizemore within fourteen days. The referee emphasized to respondent that "Mr. Sizemore, no matter the fact that you've had seven children in thirteen years of marriage, cannot be in your life, under any circumstance and in any size, shape, or form."

Subsequently, a supplemental petition for permanent custody was filed, followed by an amended petition, which alleged that respondent had contact with Sizemore, was noncompliant regarding drug screens, and had failed to protect the children from Sizemore's abuse. The FIA claimed independent knowledge that contact was occurring between respondent and Sizemore predicated on a videotape that was not commissioned by the agency. Prior to the termination hearing, respondent was provided access to the videotape and any writings and statements associated with it pursuant to a discovery order.

The termination hearing was held on May 1 and June 30, 2003, before the trial court. Private investigator Lawrence Micol testified that he did a "lifestyles check" on respondent for a client. He surveilled respondent for 357 hours beginning on December 16, 2002. On December 16, respondent attended a visitation at the FIA and then went to her apartment on Krauter Street. She was driving a Firebird. On December 19, respondent had a Dodge Neon and went to the FIA. Later, Micol lost her in traffic. On December 20, Micol saw respondent at her apartment, where she stayed for a few hours and then departed. Next, on December 27, Micol saw respondent at a location that may have been her apartment. On or about January 3, 2003, he saw her again and observed what he thought was another visitation. Then the visitations were increased, and Micol "could always find her at the visitations, but I couldn't find her in between." Micol watched the Krauter Street apartment for approximately seven hours at a time. Other times, Micol would show up in the middle of the night and respondent's car would not be at her apartment. She would "vanish" for days at a time and was gone every weekend. Respondent did not appear to be living at the Krauter Street address, according to Micol, although she did bring the minor child for about two unsupervised visits at the apartment. Sizemore did not appear on those occasions.

Finally, Micol "happened to stumble" upon respondent's car parked by a Kroger store. The location was a half-mile from Sizemore's Dorais Street house. Micol asked Kroger personnel if he could do surveillance in their parking lot. Livonia police, who were providing security for Kroger, said they had noticed the Dodge Neon out there numerous times. During the ensuing surveillance, Micol noted that respondent's car would be there for long periods of time and she would not return. Kroger was not open twenty-four hours a day; and respondent's car would be the only one in the side parking lot. On a typical weekend, respondent would park the car on a Friday evening, pick it up on Saturday to do errands, and then return it on Saturday night to the Kroger lot. Micol saw this happen six times and then started making his video.

The videotape (not part of the appellate record) depicted respondent's car parked in the lot and then being replaced with a van with Sizemore Painting Company or Sizemore Brothers written on the side. Around 3:14 a.m. on a Sunday, February 9, the Neon returned with Sizemore driving and respondent as a passenger. Both got out of the car, entered the van, and drove to the Dorais Street address. The distance between the two homes was 5.8 miles. Micol believed that respondent was really living at the house on Dorais and that the apartment on Krauter was "just a front."

On cross-examination, the trial court cut off respondent's questioning regarding the identity of Micol's client. The client was not the child's attorney, Legal Aid, or the FIA. Respondent's attorney believed it was the foster parents, and the court stated, "I'm going to assume that's probably who it was." Micol admitted that catching respondent with Sizemore was "probably my main objective."

From December 16, 2002, to February 9, 2003, Micol did not catch respondent with Sizemore. Micol stopped his surveillance after seeing the parents together on February 9. Altogether, Micol conducted surveillance five times in December, fifteen in January, and six in February. Respondent's attorney did not object to admission of the videotape, and respondent's parental rights were subsequently terminated.

On appeal, respondent first argues that she was denied a fair trial by the erroneous limitation of cross-examination of Micol. Respondent contends that disclosure of Micol's client(s) was crucial to demonstrate bias and lack of credibility and to attack the admissibility of the videotape itself. According to respondent, the information was not only relevant but also determinative to the outcome of the case.

The validity of procedures followed in a child protective proceeding is a question of law subject to de novo review. *In re CR*, 250 Mich App 185, 200; 646 NW2d 506 (2002). The admission and exclusion of evidence are within the sound discretion of the trial court. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

We hold that respondent was not denied a fair trial by the court's limitation of cross-examination of witness Micol. The termination hearing was held on a supplemental petition, alleging, in part, that respondent had contact with Sizemore. As such, the Michigan Rules of Evidence were applicable. MCR 3.977(F)(1)(b); MCR 3.903(A)(14); *In re Snyder*, 223 Mich App 85, 89-91; 566 NW2d 18 (1997). MRE 611(b) states that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." Respondent, however, has not shown how she could further attack Micol's credibility by proving what the trial court already assumed, namely that the clients were the foster parents. Respondent fails to cite any rule of evidence that would preclude the admission of the videotape and Micol's testimony simply on the basis that Micol was presumably hired by persons interested in the action. Other than excluding testimony concerning the identity of Micol's clients, the trial court did not limit respondent's ability to vigorously cross-examine Micol regarding the validity, accuracy, and soundness of his testimony and the videotape.

Respondent next argues that, assuming that the videotape was commissioned by the foster parents, it was illegally obtained and should have been excluded. Respondent maintains that the foster parents subverted their role and improperly injected themselves into the

proceedings in an effort to influence the trial's outcome to their own benefit, i.e., adoption. They hired an attorney and tried to rename the child "Naomie." Respondent contends that the videotape was the fruit of a poisonous tree that should have been excluded.

Respondent did not object to the admission of the videotape; therefore, this Court's review is limited to plain error that affects substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *In re Osborne (On Remand, After Remand)*, 237 Mich App 597, 606; 603 NW2d 824 (1999).

Generally, a properly authenticated videotape or photograph is admissible if relevant to the action and its probative value is not substantially outweighed by the danger of unfair prejudice. See *People v Sharbnow*, 174 Mich App 94, 102-103; 435 NW2d 772 (1989); *People v Furman*, 158 Mich App 302; 404 NW2d 246 (1987). The admission of videotapes is within the sound discretion of the trial court. *Sharbnow, supra* at 102-103. Here, the videotape was properly authenticated by Micol and was certainly relevant to the primary issue of whether respondent was still having contact with Sizemore. The videotape, though damaging to respondent, was not unfairly prejudicial under MRE 403.

We hold that the trial court did not err in admitting the videotape. Respondent cites several authorities in her argument, none of which goes to the issue of whether the videotape was admissible. Respondent cites MCL 722.954(1), the Foster Care and Adoption Services Act, MCL 722.951 *et seq.*, which details the orientation prospective foster parents must go through to ensure their understanding of the purposes of foster care, including its temporary nature and the ultimate goal of returning the child to the parents or preparing for adoption. Further, the same section notes that the information provided about the child and the child's family is confidential. MCL 722.954(3). Respondent also asserts that foster parents exist to serve both the child and the natural parents. Micol was provided the names and addresses of both parents and the date, place, and time of every visitation. Respondent maintains that this was a violation of the confidentiality requirement, assuming the foster parents hired Micol.

Respondent's focus is misplaced because the trial court was required to determine whether it was appropriate to terminate her parental rights under the facts and circumstances pertaining to respondent's actions and inactions, not whether the foster parents were acting inappropriately. The foster parents' actions may be relevant in the subsequent placement and adoption of the child; they are not relevant with respect to whether Micol's testimony and videotape were *admissible* at the termination hearing. That is not to say that the foster parents' actions, if they occurred, were not relevant in regard to Micol's *credibility*.[2] Certainly, if Micol was hired by the foster parents, credibility issues would exist. However, the trial court assumed that the foster parents were Micol's clients and proceeded on that basis, and it is within the trial court's realm, not this Court's, to determine weight and credibility in a bench trial. *Fletcher v Fletcher*, 229 Mich App 19, 29; 581 NW2d 11 (1998). Taking this into consideration, and also

[2] Issues of weight and credibility are distinguishable from the preliminary matter of admissibility. See *People v England*, 176 Mich App 334, 340; 438 NW2d 908 (1989), aff'd sub nom *People v Perlos*, 436 Mich 305; 462 NW2d 310 (1990).

considering that respondent was provided the opportunity to delve into the validity, accuracy, and soundness of Micol's testimony and the videotape on cross-examination, we find no error in allowing the evidence.

We also reject respondent's contention of any inappropriate behavior on the part of the FIA and affiliated agencies in seeking the introduction of the videotape. Micol's testimony and the videotape were probative of an important issue, i.e., whether respondent had discontinued her contact with Sizemore, who stood accused of sexually and physically abusing the couple's children. Had the FIA, which is responsible for protecting the well-being of children, not sought the introduction of the evidence, the agency would not have been pursuing its core function of safeguarding the minor child, especially considering the potential harm if the child was returned to respondent and if respondent remained in contact with Sizemore. There was no error.[3]

Finally, respondent argues that, without the inadmissible videotape, there did not exist sufficient evidence to support termination of her parental rights. In light of our ruling finding no error in the admission of Micol's testimony and the videotape, respondent's argument fails. The trial court did not clearly err in finding that the statutory grounds for termination were established by clear and convincing evidence. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Further, the evidence did not show that termination of respondent's parental rights was clearly not in the child's best interests. MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Jessica R. Cooper

[3] Respondent does not expand in any form or manner on the legal argument that the videotape was the "fruit of a poisonous tree" and should have been ruled inadmissible. We, therefore, decline to address the argument. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992)(a party may not merely announce her position and leave it to this Court to discover and rationalize the basis for the claim).